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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Federal-State Joint Board on | ) | CC Docket No. 96-45 |
| Universal Service | ) | |
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# COMMENTS OF PAGING NETWORK, INC. ON JOINT BOARD'S RECOMMENDED DECISION

PAGING NETWORK, INC.

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## SUMMARY

In considering the Joint Board's Recommended Decision, the Commission must be guided by Congress' fundamental precept in Section 254 of the Communications Act that universal service mechanisms are to be structured and administered in an equitable and nondiscriminatory fashion. In developing its final rules, the Commission must consider the combined impact on affected carriers of both federal and state universal service programs. This is likely to require the adoption of binding guidelines by the Commission on the structure of state universal service programs.

In fulfilling its mandate of ensuring the development of an equitable and nondiscriminatory universal service structure, the Commission should consider the disproportionate impact which universal service fund assessments can affect on telecommunications service sectors characterized by relative elasticity in demand, such as wireless services. Moreover, messaging services, for which the average monthly customer charge is small relative to the average customer revenues of other services, could disproportionately feel the impact of the universal service assessment.

Pursuant to the 1993 Budget Reconciliation Act, which was not superseded or repealed by the 1996 Telecommunications Act, states are unable to regulate the entry or pricing of CMRS providers, and exercise extremely limited universal service authority over them. At the present time, no messaging carriers are substitutable for land line

telephone exchange services in a substantial portion of any state. As a result, they should be subject to universal service regulation only at the federal level.

PageNet supports the Joint Board's recommendation that federal universal service contributions be assessed on the basis of gross revenues of the carrier less payments to other carriers. The rate of assessment on different services, however, should be adjusted in the interest of equity and nondiscrimination to reflect the contributing carrier's entitlement to support under the program. In the case of messaging services, this rate should possibly be set at no more than one-third to one-half the assessment on "eligible" telecommunications carriers.

The federal universal service assessment formula should account for both interstate and intrastate revenues of participating carriers. For CMRS providers, all revenues should be considered interstate in nature as a result of the Commission's plenary authority established in the 1993 Budget Reconciliation Act.

Finally, the universal service assessment should be reflected as a separate item on end users' bills in order to mitigate the potentially distorting effect on carriers' competition which bundling of these charges could engender. Moreover, explicit reporting of universal service charges is anticipated in the language of Section 254 of the Communications Act.

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**COMMENTS OF PAGING NETWORK, INC.**
**ON JOINT BOARD'S RECOMMENDED DECISION**

Paging Network, Inc. ("PageNet'), by its undersigned counsel, hereby comments on several aspects of the Recommended Decision of the Federal-State Joint Board on Universal Service ("Joint Board") released November 8, 1996 (hereinafter "Board Recommendation").[1]

## I. CONGRESS HAS MANDATED THAT UNIVERSAL SERVICE MECHANISMS OPERATE IN AN EQUITABLE AND NONDISCRIMINATORY FASHION

In its extensive Recommended Decision, the Joint Board has grappled diligently with the multifaceted issues relative to the restructuring of universal service standards and mechanisms embodied in new Section 254 of the Communications Act.[2] Many constructive proposals have been put forward by the Joint Board. Of particular importance is the Joint Board's recommendation that the assessment of contributions to

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1 By Order released December 11, 1996, the Chief, Accounting and Audits Division, Common Carrier Bureau, extended the deadline for filing comments from December 16 to December 19, 1996.

2 47 U.S.C. § 254.

the universal service fund at the federal level begins with the participating carrier's gross revenues.[3] By relying on this proportional denominator for measuring the carrier's share of the telecommunications market, the Joint Board has embraced effectively Congress' edict that universal service mechanisms, as recast by the Telecommunications Act of 1996 (hereinafter, "1996 Act"), be administered in an equitable and nondiscriminatory manner.[4]

The Joint Board has properly emphasized that the Commission's new universal service regime must be competitively and technologically neutral in impact.[5] Universal service mechanisms should not benefit the development of one telecommunications medium at the expense of another, but are designed to support access by a greater segment of the population to what are considered by the Joint Board to be essential telecommunications services. Yet, in advancing its proposals for implementation of Congress' universal service objectives, the Board Recommendation has provided relatively little guidance for the structuring of state universal service programs, notwithstanding that Section 254(f) of the amended Communications Act expressly recognizes the prospective coexistence of state universal service programs with those at the federal level.

PageNet submits that, in considering the Board Recommendation as a basis for formulating its final universal service rules, the Commission must anticipate the combined impact on interstate carriers of both the federal and state universal service

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3 PageNet's complete comments regarding how universal service contributions should be assessed are found in Part III *infra*.

4 47 U.S.C. §§ 254(b)(4), (d), (f).

5 Board Recommendation, ¶ 23.

programs and should strive to create a regulatory regime which will not permit the combined weight and interplay of these mechanisms to fall inequitably or discriminatorily on any category of competing carrier, be it incumbent versus new entrant, or wireline versus wireless service provider. It is likely that this result will require the adoption by the Commission of binding guidelines for the structuring of state universal service programs within the parameters of the 1996 Act.

In approaching the Commission's mandate in this framework, PageNet further submits that the Commission should be cognizant of the effect which its final rules will have on the size -- and resultant weight for consumers -- of the combined universal service fund at the federal and state levels. Notwithstanding the characterization of the Joint Board that "telecommunications carriers" are to pay for universal service,[6] the cost of universal service mechanisms will ultimately be borne by the end users of the telecommunications system.[7]

In this connection, the Commission should consider when formulating its final rules the relative impact that universal service mechanisms will have on competing service technologies with different elasticities in usage and demand. The cost of the universal service mechanism can be expected to be borne more readily by the relatively captive local exchange customers than by the currently more price-sensitive wireless industry. In this regard, the Commission must be sensitive to the fact that price increases for services which are considered "non-essential" by the Joint Board are likely to affect demand negatively more readily than are price increases for essential services, such as certain local exchange services. It simply makes no sense to allow regulatory universal

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6 *Id.*, ¶ 812.

7 *See* Board Recommendation, Separate Statement of Commissioner Chong, at 14.

service mechanisms designed to broaden the population's access to telecommunications services to result in a loss of subscribership to service sectors which was originally generated through competitive market forces.[8]

Moreover, to the extent that messaging services, considered by the Board to be non-essential, command smaller average monthly revenues on a per-customer basis, the impact of the universal service assessment can be expected to have a disproportionately adverse impact. Thus, when structuring how the universal service mechanism is to be supported by the community of competing telecommunications service providers, the Commission must be cognizant of both the relative burden of this mechanism on the user base of different providers and of the relationship between contribution levels for and expected support from the fund. These combined factors will be critical for purposes of meeting the explicit Congressional mandate that contributions at both the federal and state levels be equitable and nondiscriminatory.

Finally, as will be discussed more comprehensively in Part III below, PageNet submits that the Commission must also consider the appropriateness of a reduced rate of assessment for carriers which will not, under the definitions of universal service which the Commission establishes, be able to draw support from the fund into which they are required to contribute.

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[8] Indeed, the relatively price-insensitive nature of the primary residential and business line market is functionally linked to the Joint Board's Recommendation Decision as to what types of service are to comprise universal service under the 1996 Act.

## II. CONGRESS HAS DELEGATED TO THE COMMISSION PLENARY JURISDICTION OVER CMRS PROVIDERS

In its Recommended Decision (¶ 791), the Joint Board observes ellyptically: "we find that section 332(c)(3) [of the Communications Act] does not preclude states from requiring CMRS providers to contribute to state support mechanisms." This finding overstates the legal authority of state governments to require contributions from CMRS operators following the 1993 Budget Reconciliation Act, which delegated to the Commission broad regulatory authority over CMRS operators, including for universal service purposes.

Of salient import in this regard is the fact that, in the 1993 Budget Reconciliation Act, Congress amended Section 332(c)(3) of the Communications Act to provide that "no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service."[9] The legislative history of the 1993 Communications Act amendment further evidences Congress' intent in that statute to preempt state authority over CMRS regulation. In its deliberations, Congress recognized that, by their nature, mobile services operate without regard to state jurisdictional boundaries.[10] As a result, disparate state regulation of commercial mobile

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9 47 U.S.C. § 332(c)(3).

10 See H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 260 (1993) (Congress intended to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure").

services could hinder the development of CMRS competition and the build-out of a wireless infrastructure. Congress, thus, intended for mobile services to be subject to uniform rules,[11] and it authorized the Commission to exercise plenary and exclusive jurisdiction over intrastate and interstate CMRS entry and rates.[12]

With regard to state authority over CMRS carriers for universal service purposes, Congress was extremely specific in defining a limited scope of potential involvement. Section 332(c)(3) of the Communications Act, which was adopted in the 1993 legislation, states in relevant part:

> "Nothing in this subparagraph shall exempt providers of commercial mobile services (which such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications services at affordable rates."

Thus, Section 332(c)(3) of the Communications Act permits the states to regulate universal service responsibilities for CMRS carriers providing intrastate services within their jurisdictions only to the extent CMRS services "are a substitute for land line

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11 *Id.* at 259.

12 *See* H.R. Rep. No. 103-213, 103d Cong., 1st Sess. at 497 (1993) (emphasizing amendment to 47 U.S.C. § 152(b) as "clarify[ing] that the Commission has the authority to regulate commercial mobile services").

telephone exchange service for a substantial portion of the communications within such State."

This specific directive regarding state authority over CMRS providers relative to universal service responsibilities was not altered by the 1996 Telecommunications Reform Act. In contrast to the particularly crafted formula relative to CMRS operators alone found in the 1993 legislation, Section 254(f) of the 1996 Act provides generally:

> "A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State."

States' universal service authority in relation to *CMRS* providers, however, is already specifically delimited by the particular provisions of Section 332(c)(3) recited above. The general authority recognized for states under section 254(f) regarding universal service principles must yield to the more specific restrictions on that authority laid down in section 332(c)(3) with particular regard to CMRS providers. Furthermore, Section 254(f) is, by its terms, made applicable only to intrastate services. As has already been noted, CMRS services are, by their nature and as a matter of federal law, interstate in character.

No provision of the 1996 Act purports to repeal the 1993 amendment of the Communications Act. Indeed, Section 253 of the Communications Act, added by the 1996 Act, provides that state "requirements necessary to preserve and advance universal service" in a manner consistent with Section 254 are not considered to be barriers to entry. Subsection (e) of Section 253, however, expressly provides: "Nothing in this section shall affect the application of section 332(c)(3) to commercial mobile service providers."[13] Thus, the 1996 Act expressly recognizes the continuing vitality of Section 332(c)(3) as the standard governing the ability of states to impose universal service requirements on CMRS operators.

At this time, no messaging providers can be considered to serve as a substitute for landline telephone service for a significant portion of any state. Accordingly, Section 332(c)(3) of the Communications Act anticipates an extremely narrow range of state authority to regulate wireless carriers for universal service purposes. Under present circumstances, this authority has no practical applicability to messaging operators.[14]

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13 47 U.S.C. § 253(e).

14 In keeping with the 1996 Act's definition that "universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services," 47 U.S.C. § 254(c)(1), PageNet acknowledges that some CMRS operators might in the future become subject under Section 332(a)(3) to universal service obligations in certain states. For the present, however, PageNet is unaware of any

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The only circumstance under which a state may legally impose universal service requirements on CMRS providers operating within their jurisdictions is to the extent the state is able to make specific, affirmative findings that CMRS providers are providing services as a "substitute for land line telephone exchange service for a substantial portion of the communications within such state." In this regard, the Joint Board's casual observation that Section 332(c)(3) of the Act "does not preclude" states from requiring CMRS providers to contribute to state universal service support mechanisms requires refinement and qualification by the Commission in order to reflect the proper scope of Congressional directive on this subject. Such clarification by the full Commission is particularly critical in light of the fact that a number of state governments have begun to try to impose universal service contribution requirements on CMRS operators without making the affirmative determination discussed above. In order to prevent Congress' careful allocation of universal service responsibilities for CMRS operators from being undone, regulatory direction from the Commission is required at this time.

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circumstances in which a state would be able to make a finding that the standards of this statutory provision have been met.

## III. FEDERAL UNIVERSAL SERVICE CONTRIBUTION REQUIREMENTS SHOULD BE LINKED TO CARRIER ELIGIBILITY FOR SUPPORT

As a general principle, PageNet supports the Joint Board's recommendation that interstate telecommunications service providers should be assessed for contributions to the federal universal support mechanism on the basis of their gross telecommunications revenues net of payments made to other telecommunications carriers. PageNet finds persuasive the Joint Board's findings that this formula eliminates, or mitigates, the risk of "double payments" that an assessment based on gross revenues alone would pose, and that an assessment which takes account of payments to other carriers whose facilities and services are used more closely approximates a "value-added"-based contribution.[15]

PageNet maintains, however, that universal service contributions calculated in the proposed manner should also be based on a progressive scale or weighting factor linked to the assessed carrier's eligibility for potential support payments under the universal service program. As observed in Part I above, fundamental to the concept of universal service in the 1996 Act is the Congressional recognition that interstate telecommunications carriers' contributions are to be assessed on an "equitable and nondiscriminatory basis."[16] It is submitted that, in order for these standards to be

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15 *See* Board Recommendation, ¶¶ 778, 807-810. PageNet, however, does not agree with the Joint Board's analogy of such a funding formula to that used for determining TRS support. Board Recommendation, ¶¶ 785-86. PageNet believes it remains important to recall the separate statutory bases for universal service and TRS support, and the fact that they do not address identical policy objectives. It is noted in this regard that, while citing TRS as a useful model for defining interstate telecommunications revenues, the Joint Board has excluded TRS from the definition of universal service under the 1996 Act and has also elected to utilize a contribution formula materially different from that employed for TRS contributions, *i.e.*, one that accounts for payments made to other telecommunications carriers.

16 Section 254(d), 47 U.S.C. § 254(d).

provided any meaning, the rate at which a carrier is assessed must be related to the likelihood that such carrier will have an opportunity to draw from the fund into which it is contributing.

The import of this proposed qualification of the Joint Board's recommended assessment formula is that, while the Board has recommended that the definition of telecommunications carriers that must contribute to universal service support mechanisms be construed broadly (Board Recommendation, ¶ 784), it has proposed a highly restrictive interpretation of the concept of carriers eligible for support payments. The Joint Board recommends that the definition of "eligible telecommunications carriers" in Section 214(e) of the Communications Act[17] requires that a carrier must be capable of providing *each* of the services designated by the Joint Board for support throughout the carrier's service area. Board Recommendation, ¶¶ 79-83, 134.[18]

In the case of messaging service providers, like PageNet, this recommended interpretation effectively *guarantees* that the service provider will be unable to qualify for support. Messaging service, by definition, is not intended or designed to provide access to the type of voice-grade service contemplated under the definition of universal service -- two-way, interactive, real-time communication. Moreover, such *other elements* as access to emergency services, operator services, and directory assistance will not be an offering of messaging services in the foreseeable future. Because PageNet and other messaging service providers cannot support *each* of the several designated service elements which comprise the bundle of recommended universal service offerings,

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17 47 U.S.C. § 214(e).

18 An exception is offered for carriers that are technically incapable of offering toll limitation services to qualifying low-income consumers. Board Recommendation, ¶ 134.

according to the Board Recommendation, they will be eligible for *no* support under the program. If such messaging service providers are assessed on the same scale that other interstate telecommunications carriers which are also "eligible" carriers within the Board's understanding, then they will effectively be taxed to support the subsidization of other categories of service providers. This would not meet the statutory standard in Section 254(d) of either "equitable" or "nondiscriminatory" contributions. Moreover, it would violate the Joint Board's own precept of structuring a universal service program that is "competitively neutral."

Messaging companies compete with other telecommunications service providers in the increasingly dynamic convergent marketplace. Messaging providers compete in providing certain services provided by telephone exchange service providers, including both wireline and wireless carriers. Competitors to messaging companies that can provide each of the "core" services that the Joint Board has recommended are eligible for support by the universal service fund, however, will be entitled to recover a portion of costs of these services from the fund. Messaging providers will not. As a result, the currently proposed universal service fund mechanism will place messaging service providers at a competitive disadvantage by forcing them to contribute at the same level to a fund which will work to benefit their competitors to a far greater degree than it benefits them. In this manner, the Congressional mandate for a universal service support program intended to foster public welfare by making telecommunications services available to a larger segment of the population is being distorted -- no doubt, unintentionally -- into a vehicle to skew market forces among competing service providers.

One way to overcome, or at least mitigate, this unacceptable result under the 1996 Act would be to subject carriers determined under the Joint Board's formula to be "ineligible" to an assessment rate less than that of eligible carriers. This rate could be proportionately adjusted on the basis of the likelihood of the ineligible carrier ever being

determined eligible. Perhaps more scientifically, the ineligible carrier's contribution rate should be established in proportion to how many of the six identified universal service elements[19] it is able to provide or, alternatively, from how many services it can receive benefits. In the case of messaging services, for example, perhaps the messaging carrier should be assessed one-third to one-half the rate assessed carriers that benefit from the pool and can draw support from the pool. In this manner, the Commission would fulfill Congress' mandate of ensuring equity and nondiscrimination in its administration of the universal service program.

## IV. FEDERAL CONTRIBUTIONS SHOULD BE ASSESSED ON ALL INTERSTATE AND INTRASTATE REVENUES

While the Joint Board recommends that universal service support for schools, libraries and rural health care providers be funded by assessing both the interstate and intrastate revenues of telecommunications service providers,[20] it defers a determination of whether the high cost area and low income assistance programs should similarly be funded in this manner.[21] PageNet recommends that contributions to the entire federal universal service fund be based upon both interstate and intrastate revenues of participating carriers.

The majority of services deemed by the Joint Board to be eligible for universal service support are intrastate in nature. Therefore, it is appropriate for the size

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19 Board Recommendation, ¶¶ 45-53, 65-67.

20 Board Recommendation, ¶ 718.

21 *Id.*, ¶¶ 814, 822.

of the federal fund to be maximized by being created from intrastate, as well as interstate, revenues. Assessments based on gross interstate and intrastate revenues will also be easier for the Commission to administer, and will reduce the opportunity for manipulation of jurisdictional classifications. The adoption of a contribution formula based solely upon interstate revenues would require the promulgation by the Commission of a complex regime of separation rules.[22]

If the Commission, after further study of this issue as the Joint Board has recommended, elects to attempt to structure an assessment formula that separate interstate from intrastate revenues, PageNet notes that, in any case, all revenues of CMRS providers must be considered, by definition as a matter of federal law, interstate in nature and subject to assessment only at the federal level (*see* discussion in Part I above). In this connection, PageNet again reminds the Commission of Congress' fundamental precept in adopting Section 254 of the Communications Act, that contributions to universal service support mechanisms are to be based on equitable and nondiscriminatory standards at both

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[22] Although the Joint Board cites the TRS program as an existing model under which carriers are assessed on the basis of their interstate revenues (Board Recommendation, ¶¶ 785-86), in point of fact carriers have broad discretion regarding the method they employ to report their interstate revenues under this program. the methods employed in this highly specialized program are not at this time effectively audited by either the Commission or the fund administration, largely due to the *de minimus* nature of the assessment. It is submitted that this application of the separate American With Disabilities Act does not constitute an effective paradigm for what will be a much more substantial assessment program addressing differing Congressional objectives and standards.

the federal and state levels. Thus, in structuring a universal support program that separates contributions for non-CMRS carriers on federal-state jurisdictional lines, the Commission would need to maintain a large-scale overview of the relative burden of the federal assessment on CMRS providers in relation to those of competing telecommunications service carriers at both the federal and state levels. By applying the concepts offered by PageNet in Part III of these Comments, the prospects for such equitable and nondiscriminatory treatment would be maximized.

## V. UNIVERSAL SERVICE SUPPORT CHARGES SHOULD BE REFLECTED AS A SEPARATE END USER LINE ITEM

Under Section 254 of the 1996 Act, Congress directed that the mechanisms established by the Commission for universal service support are to be "specific, predictable and sufficient."[23] In addition, support provided to carriers from the universal service fund to advance the objectives of universal service are to be both "explicit and sufficient" for the intended purposes.[24] These directives of the universal service statute indicate a Congressional intention that the subsidization of universal service objectives be explicitly understood by end users of the telecommunications network and by the public at large.

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23 47 U.S.C. § 254(d).

24 47 U.S.C. § 254(e).

It is submitted that, in fulfillment of this statutory directive, the universal service assessment imposed on each carrier be disclosed as a separate line item charge on the carrier's customers' bills.[25] Such a procedure would also work to avoid the disclosure of the universal service assessment becoming an element of competition among telecommunications service providers. In the case of service providers whose average customer statements are at the low end of the competitive scale, such as messaging operators, this will be particularly important, as the universal service charge could prove to be a far more material incremental addition to the monthly service bill than in the case of other providers of services for which consumer demand is less elastic. In this regard, the disclosure of the universal service charge as a line item becomes an implementation of

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[25] The Joint Board recognizes in its Recommended Decision (¶ 808) that Section 254 does permit carriers to pass through to users of unbundled elements an equitable and nondiscriminatory portion of their universal service obligations. It would be unreasonable for the Commission to interpret the statute to allow such a pass through at the wholesale but not the retail level.

the Commission's mandate to structure universal service mechanisms in an equitable and nondiscriminatory fashion, and one which is at the same time competitively neutral.

Respectfully submitted,

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December 19, 1996

## CERTIFICATE OF SERVICE

I, Michele A. Depasse, hereby certify that the foregoing *"Comments of Paging Network, Inc."* were sent, this 19th day of December 1996, by U.S. first class mail, postage prepaid, to the attached service list.

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